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7 **UNITED STATES BANKRUPTCY COURT**
8 **EASTERN DISTRICT OF WASHINGTON**

9 In re:

Case No. 18-03197 FPC 11

10 GIGA WATT, Inc., a Washington
11 corporation,

The Honorable Frederick P. Corbit

12 Chapter 11

13 Debtor.

14

15 **MEMORANDUM IN SUPPORT OF**
16 **CHAPTER 11 TRUSTEE'S MOTION**
17 **FOR ORDER APPROVING SALE**
18 **OF EQUIPMENT FREE AND**
19 **CLEAR OF ALL LIENS, CLAIMS**
20 **AND INTERESTS, APPROVAL OF**
21 **NOTICE THEREOF AND**
22 **RELATED RELIEF**

23

24 **Telephonic Hearing**

Date: April 9, 2020
Time: 10:30 a.m. PT
Telephone: 877-402-9753
Access Code: 3001392

25 Memorandum in Support of Chapter 11 Trustee's Motion for Order Approving
26 Sale of Equipment, etc.

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Memorandum in Support of Chapter 11 Trustee's Motion for Order Approving
Sale of Equipment, etc. - Page ii

1 Mark D. Waldron, in his official capacity as the Chapter 11 Trustee (the
2 “**Trustee**”), hereby respectfully submits this memorandum in support of the
3 *Chapter 11 Trustee’s Motion for Order Approving Sale of Equipment Free and*
4 *Clear of all Liens, Claims and Interests, Approval of Notice Thereof and Related*
5 *Relief* (the “**Motion**”) and in support of the Motion avers as follows:

6 **I. INTRODUCTION**

7 Subject to Court approval and overbidding, the Trustee has negotiated an
8 agreement (“**Sale Agreement**”)¹ with Gib Compute, LLC (“**Gib**” or “**Buyer**”), a
9 Delaware limited liability company, to sell (“**Sale**”) (i) a set of transformers,
10 switchboards, fans and other equipment that located at the Debtor’s former site
11 located on 643, 644, 675 & 676 South Billingsley Drive, East Wenatchee
12 Washington 98802 (“**Pangborn Site**”) and (ii) a set of power distribution and
13 power supply units (“**Other Equipment**”) located at the estate’s facilities in
14 Moses Lake, Washington (“**Moses Lake Facility**”) and in East Wenatchee,
15 Washington (“**TNT Facility**”). The purchase price (“**Purchase Price**”) is
16 \$175,000, subject to overbidding.

17 The Pangborn Equipment and the Other Equipment are listed on Schedule 1
18 to the Sale Agreement. (Exhibit B to the Motion)

19 As set forth more fully below, the Sale serves the twin goals of clearing the
20 Pangborn Site and recovering value for the benefit of creditors and parties in
21 interest.

22

23 ¹ A copy of the Sale Agreement is attached to the Motion as Exhibit B.

II. RELIEF REQUESTED

The Trustee requests that the Court:

1. approve the Sale Agreement;
 2. approve the Sale free and clear of any liens, claims or interests

pursuant to 11 U.S.C. §§ 363(f)(4) and (5).

3. approve the bidding procedures (the “**Bidding Procedures**”) and break-up fee (“**Break-Up Fee**”) provided by the Sale Agreement pursuant to which third parties may bid in a first increment of \$10,000 above the Purchase Price and in subsequent increments of \$5,000 with a Break-Up Fee to Buyer in the amount of three percent (3%) of the final purchase price if Buyer does not win the overbidding; and

4. find that the sale is in good faith and waive the 14-day stay provided by Rule 6004(h) of the Federal Rules of Bankruptcy Procedure.

III. JURISDICTION AND VENUE

The Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157. Venue is proper in this district pursuant to 28 U.S.C. § 1408 and 28 U.S.C. § 1409.

The statutory predicates for the relief requested in the Motion are sections 105 and 363 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 9014 and L.B.R. 2002-1 and L.B.R. 6004-1.

IV. FACTUAL BACKGROUND

On March 9, 2017, the Chelan Douglas Regional Port Authority, formerly known as the Port of Douglas County (the “**Port**”) and Giga Watt, Inc. (“**Giga**”)

Memorandum in Support of Chapter 11 Trustee’s Motion for Order Approving Sale of Equipment, etc. - Page 2

1 **Watt**" or the "**Debtor**") executed that certain *Land Lease for Portion of Pangborn*
2 *Airport Business Park East Wenatchee, Washington* (the "**Port Lease**")² pursuant
3 to which Giga Watt leased the Pangborn Site from the Port.

4 On November 19, 2018 (the "**Petition Date**"), Giga Watt, Inc. commenced
5 this case by filing a voluntary petition for relief pursuant to sections 101, *et seq.* of
6 title 11 of the United States Code (the "**Bankruptcy Code**").

7 On January 23, 2019, the Court approved the appointment of Mark D.
8 Waldron as the Trustee pursuant to its *Order Approving Appointment of Chapter*
9 *11 Trustee* [Docket No. 146]. In June 2019, the Port Lease was deemed rejected.

10 On February 18, 2019, Neppel Electrical and Controls, LLC ("**Neppel**")
11 filed a proof of claim in which it asserted a lien against the real property at the
12 Pangborn Site. The claim is in the amount of \$479,959.63. On or about July 25,
13 2019, Neppel assigned its claim to Winland Credit Partners LLC. [ECF 344]

14 On March 24, 2020, the Court entered an Order, which *inter alia*, requires
15 the Trustee to remove the Pangborn Equipment from its current location by May
16 7, 2020. Otherwise, the Pangborn Equipment will be deemed abandoned. [ECF
17 515]. The Order granted the *Port's Amended Motion for Relief from Automatic*
18 *Stay; Abandonment of Property of the Estate; Waiver of FRBP 4001(a)(3)* [ECF
19 478] after a hearing held on March 18, 2020. At that hearing, the Trustee
20 described the Sale and represented that the purchase price for the Sale was
21 \$200,000. After that hearing, the Buyer asked to reduce the price in light of the

22
23 ² A copy of the Port Lease is attached hereto as **Exhibit 1**.

1 corona virus pandemic and the condensed time schedule for removal of all
2 equipment. After negotiations, we agreed to a new price of \$175,000.

3 At the hearing, the Court stated that this Motion could be heard on seven (7)
4 days' notice.

5 **V. EQUIPMENT TO BE SOLD**

6 The material terms of the Sale Agreement are set forth in the Motion and
7 are incorporated herein by reference as if set forth fully herein.

8 On the Pangborn Site, the Debtor built (i) thirteen (13) pre-fabricated
9 buildings (referred to as “**Pods**”), one of which was operational, and (ii) six (6)
10 partially built additional Pods, none of which were operational. Almost all the
11 operational Pods contain transformers, fans, electrical meters, switch gears and
12 breaker panels with associated electrical wiring and conductors. The Pods are
13 made of sheet metal and wooden beams. Pursuant to the Sale, the Buyer may, but
14 is not required, to strip the Pods of anything that it deems of value. It may, but is
15 not required, to demolish the Pods. The Buyer may also remove all other
16 equipment that is located on the Pangborn Site, which includes such things as
17 vault covers, additional fans and shelving. The Trustee expects the Buyer to
18 remove almost all the Pangborn Equipment. The Pangborn Equipment and Other
19 Equipment is itemized on Schedule 1 attached to the Sale Agreement.³

20 In addition, pursuant to the Sale, the Buyer will purchase (i) 64 PDUs
21 located at the Moses Lake Facility and (ii) 270 PDUs and approximately 425
22

23 ³ The Sale Agreement with Schedule is attached to the Motion as Exhibit B.

24 Memorandum in Support of Chapter 11 Trustee’s Motion for Order Approving
25 Sale of Equipment, etc. - Page 4

1 PSUs located at the TNT Facility. Much remaining equipment remains at the
2 Moses Lake Facility and the TNT Facility.

3 **VI. POINTS AND AUTHORITIES**

4 **A. The Sale Is Authorized Pursuant to 11 U.S.C. § 363(b)(1)**

5 Under section 363(b)(1) of the Bankruptcy Code, the Trustee may use, sell,
6 or lease property of the estate, other than in the ordinary course of its business. 11
7 U.S.C. § 363. The decision to enter into a transaction that is outside the ordinary
8 course of the debtor's business must be based on the Trustee's reasonable business
9 judgment and supported by "some articulated business justification." *In re Ernst*
10 *Home Ctr., Inc.*, 209 B.R. 974, 979 (Bankr. W.D. Wash. 1997) (quoting *In re*
11 *Lionel Corp.*, 722 F.2d 1063, 1070 (2nd Cir. 1983)).

12 **1. The Pangborn and Other Equipment Is Property of the Estate.**

13 The Port Lease provided that Giga Watt would own all improvements and
14 property placed on the Pangborn Site, including fixtures. The Port Lease
15 contained only one exception to this rule. The Port would own any Permanent
16
17 Structures built on the Pangborn Site. Exh. 1, Port Lease, § 7.c. The Port Lease
18 defines Permanent Structures:

19 The term Permanent Structures shall include roofed and walled
20 buildings built for permanent use and shall exclude pre-
21 fabricated slab on-grade buildings that could be removed from
22 the Premises by the Tenant regardless of their constructional
23 design and size).

24 **Exh. 1, Port Lease, § 7.c.**

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26 Sale of Equipment, etc. - Page 5

1 The Pangborn Equipment, which includes the Pods, are not Permanent
2 Structures. The Pods are pre-fabricated buildings built on slab-on grade cement.
3 They could be removed from the Pangborn Site. Therefore, none of the Pangborn
4 Equipment falls within the Permanent Structure exception to the Port Lease and
5 all of the Pangborn Equipment is property of the estate.

6 The Other Equipment is also property of the estate. With respect to the
7 PDUs located at the Moses Lake Facility, the Trustee moved them from the
8 Debtor's warehouse located in Rock Island, Washington after rejecting that lease.⁴
9 The Trustee removed the rest of the Other Equipment from the Pangborn Site and
10 stored it at the TNT Facility.

11 2. Sound Business Judgment Supports the Sale Agreement

12 The Trustee has tested the market for the Pangborn Equipment and has
13 determined that \$175,000 is market value. The Pangborn Equipment is essentially
14 a niche set of property. Some of Pangborn Equipment was custom built. Much of
15 the Pangborn Equipment is gauged to European – not U.S. – standards. The
16 Pangborn Equipment is very heavy, requiring machinery, including a forklift, to
17 remove. The Trustee has determined that it would cost not less than \$18,000 just
18 to move the Pangborn Equipment, further diminishing its marketability.

19 The Trustee and his team have spoken with not less than ten potential
20 purchasers before agreeing to the Sale Agreement, subject to Court approval.
21 Because the property is so specialized, the Buyer is the only party to have made an
22

23 ⁴ The Trustee rejected the lease for the warehouse in Rock Island, Washington.

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25 Sale of Equipment, etc. - Page 6

1 offer on the Pangborn Equipment and Other Equipment. Furthermore, pursuant to
2 the Pangborn Order [ECF 515], the Trustee has until May 7, 2020 to remove the
3 Pangborn Equipment. Otherwise, the Pangborn Equipment will be deemed
4 abandoned.

5 Given the foregoing, the Sale is an exercise of sound business judgment.

6 **B. The Overbid Procedures and Break-Up Fee Are in the Best
7 Interests of the Estate**

8 The overbid procedures are reasonable and in the best interests of the estate.
9 As set forth in the Motion, the Sale Agreement permits overbids at or before the
10 hearing on the Motion, provided that the first overbid is \$10,000 or more than the
11 Purchase Price. Subsequent overbids must be in increments of \$5,000. A bidder
12 must establish the bidder's financial ability to meet all the terms of the
13 Agreement. Bidders must also establish the ability to remove the Pangborn
14 Equipment by May 2, 2020. The Trustee will decide the highest and best offer, in
15 his sound business judgment, subject to court review and approval.

16 The Buyer would not enter into the Sale Agreement without the overbid
17 procedures and the Break-Up Fee. The proposed bidding procedures ensure that
18 the estate will benefit in the event of overbidding even after payment of the Break-
19 Up Fee. *Cf. In re Am. W. Airlines, Inc.*, 166 B.R. 908, 912 (Bankr. D. Ariz. 1994)
20 (court considers best interests of the estate in reviewing a breakup fee; collecting
21 and discussing cases therein).

C. The Motion Satisfies the Elements of 11 U.S.C. § 363(f)

2 The Trustee seeks an order making the sale of the Pangborn Equipment and
3 Other Equipment free and clear of any lien, claim or interest in the Pangborn
4 Equipment. The Trustee is not aware of any lien, claim or interest in the Pangborn
5 Equipment or Other Equipment. However, Neppel Electrical and Controls, LLC
6 (“**Neppel**”) has filed a proof of claim (the “**Lien Claim**”) in which it asserts a
7 mechanics’ lien on the Pangborn Site under Washington law. *See Proof of Claim*
8 No. 121-2. This claim was assigned to Winland Credit Partners LLC. *See Transfer*
9 *of Claim Other Than for Security*, filed on July 25, 2019, [ECF 344].

10 Moreover, the landlord at the Moses Lake Facility (the “**Moses Lake**
11 **Landlord**”) may assert a security interest in the Other Equipment based on a
12 security interest that was granted within 90 days of the Petition Date which was
13 pursuant to a resolution of the Debtor’s prior default under leases between the
14 Debtor and the Moses Lake Landlord.⁵

15 Section 363(f) allows the Chapter 11 Trustee to sell property of the estate
16 free and clear of liens if “such interest is in *bona fide* dispute,” or “such entity
17 could be compelled, in a legal or equitable proceeding, to accept a monetary
18 satisfaction of such interest.” 11 U.S.C. §§ 363(f)(4) and (5). Both provisions
19 apply here.

20 The Lien Claim relates to the real property and permanent improvements
21 made thereon. The Pangborn Equipment and Other Equipment are not permanent

²³ ⁵ Allrise has asserted a claim in miners which are not part of this Sale and a pod at Moses Lake Facility, which is also not part of the Sale.

1 structures or improvements. Therefore, the Lien Claim would be disputed if
2 asserted against the Pangborn Equipment or Other Equipment. *See Estate of*
3 *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wash. 2d 489, 501, 210 P.3d 308,
4 314 (2009) (mechanics' liens apply to improvements that "will be permanently
5 affixed to or part of the realty.").

6 Any security interest asserted by the Moses Lake Landlord would also be
7 disputed on the ground that it is an avoidable preference pursuant to section 547 of
8 the Bankruptcy Code.

9 Furthermore, under section 363(f)(5), a sale free and clear of any interest
10 may occur if "such entity *could be* compelled, in a legal or equitable proceeding,
11 to accept a money satisfaction of such interest." 11 U.S.C. § 363(f) (emphasis
12 added). Importantly, the claim does not have to be paid in order to satisfy section
13 363(f). *See In re Lady H Coal Co., Inc.*, 193 B.R. 233, 247–48 (Bankr. S.D. W.
14 Va. 1996) (referring to "hypothetical" satisfaction under (f)(5), since the
15 subsection uses "could be" compelled and not "must be" or "shall be"
16 compelled.). Any claims asserted by Neppel or the Moses Lake Landlord may be
17 compensable in a money satisfaction. In fact, both Neppel and the Moses Lake
18 Landlord have filed proofs of claim in this case seeking such monetary
19 satisfaction.

20 For all the foregoing reasons, the Debtor has satisfied the elements of 11
21 U.S.C. § 363(f).

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1 D. **The Sale of the Personal Property Is in Good Faith**

2 The Trustee requests a finding that the Sale Agreement is made in good
3 faith pursuant to 11 U.S.C. § 363(m). Under § 363(m) of the Bankruptcy Code:

4 [w]hen a sale of assets is made to a good faith purchaser,
5 it may not be modified or set aside unless the sale was
6 stayed pending appeal.

7 *In re Filtercorp, Inc.*, 163 F.3d 570, 576 (9th Cir. 1998). *See also* Fed.R.Bank.P.
8 6004(h):

9 An order authorizing the . . . sale . . . of property . . . is
10 stayed until the expiration of 14 days after entry of the
11 order, ***unless the court orders otherwise.***

12 *Id.* (emphasis added).

13 A good faith buyer “is one who buys ‘in good faith’ and ‘for value.’” *Ewell*
14 *v. Diebert (In re Ewell)*, 958 F.2d 276, 281 (9th Cir. 1992). The analysis is holistic
15 and does not depend on any one factor. *See also In re Onouli-Kona Land Co.*, 846
16 F.2d 1170, 1174 (9th Cir. 1988) (“Ninth Circuit authority . . . does not make good
17 faith depend on ‘value’”); *accord In re Lind*, 2019 WL 2950167, at *4
18 (B.A.P. 9th Cir. July 8, 2019) (“[A] a good faith finding does not turn on the
19 purchase price in isolation.”).

20 The Sale Agreement was negotiated at arm’s length, with each party
21 represented by counsel. The Buyer is not an insider of the Debtor and is
22 disinterested. The bidding procedures, if approved, will ensure that the Purchase
23 Price is put to the test of other interested buyers. The Trustee is motivated to enter
24 into the Sale in order to benefit the estate both by monetizing the Pangborn
25 Equipment and Other Equipment and clearing the Pangborn Site.

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25 Sale of Equipment, etc. - Page 10

1 The Trustee submits that this is sufficient to find that the Sale Agreement
2 was made in good faith.

3 **E. The Form and Manner of Service of the Notice of Sale Is**
4 **Sufficient**

5 The Notice of Sale, attached to the Motion as Exhibit C, complies with
6 Bankruptcy Rule 2002(a)(2) in that the Court granted permission to serve the
7 Notice of Sale on seven (7) days' notice. Service will be accomplished on or
8 before April 2, 2020, which is seven (7) days before the hearing date of April 9,
9 2020. The Trustee is serving the Notice of Sale on (i) the U.S. Trustee's Office,
10 (ii) counsel for the Official Committee of Unsecured Creditors, (iii) everyone on
11 the Master Mailing List and (iv) everyone with whom the Trustee has ever
12 discussed the sale of the Pangborn Equipment and Other Equipment.

13 The Notice of Sale also contains all the information required by Bankruptcy
14 Rule 2002(c)(1) and L.B.R. 2002-1. In particular, it includes a copy of Schedule 1
15 to the Sale Agreement and describes both the Sale and the Bidding Procedures. It
16 also provides the Trustee's contact information for potential bidders to learn more
17 about the Sale, including, but not limited to, the Pangborn Equipment and the
18 Other Equipment.

19 Based on the foregoing, the form and manner of service of the Notice of
20 Sale is sufficient.

21 **VII. CONCLUSION**

22 WHEREFORE, the Trustee respectfully requests entry of an Order:

23 1. Granting the Motion;

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25 Sale of Equipment, etc. - Page 11

- 1 2. Approving the Sale Agreement;
- 2 3. Approving the Bidding Procedures;
- 3 4. Authorizing the Trustee to enter into and perform pursuant to the
- 4 terms of the Agreement;
- 5 5. Approving the form and manner of service of the Notice of Sale; and
- 6 6. Granting such other and further relief as the Court deems necessary
- 7 and just.

8 Dated: March 30, 2020

POTOMAC LAW GROUP PLLC

9

10 By: /s/ Pamela M. Egan
 Pamela M. Egan (WSBA No. 54736)

11 *Attorneys for Mark D. Waldron, Chapter 11*
 Trustee

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